

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 FUTUREWISE,

4
5 Petitioner,

6 v.

7
8 THURSTON COUNTY ,

9 Respondent.

Case No. 09 -2-0006

FINAL DECISION AND ORDER

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12 **I. PROCEDURAL HISTORY**

13 The Petition for Review (PFR) in this case was filed on March 2, 2009. In that PFR,
14 Petitioner challenged Thurston County's adoption of Resolution No. 14180 and Ordinance
15 14181. The challenge focused on the County's alleged failure to designate working farms
16 as agricultural lands of long-term commercial significance; failure to allow for consideration
17 of all prime farmland soils in designating agricultural lands of long-term commercial
18 significance; failure to properly apply the designation criteria so as to include lands
19 converted to agricultural lands since the County last designated agricultural lands of long-
20 term commercial significance; and erroneously adopting agricultural land designation criteria
21 which are not supported by the best available science and may lead to the de-designation of
22 agricultural lands.¹

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25 On April 27, 2009, the County moved for summary judgment.² Futurewise replied and
26 conceded that the County's motion should be granted in part and denied in part.³
27 Futurewise argues to the extent Resolution No. 14180 and Ordinance 14181 were found to
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31 ¹ March 2, 2009 Petition For Review; April 13, 2009 Prehearing Order.

² April 27, 2009 Thurston County's Motion for Summary Judgment Dismissal.

³ May 7, 2009 Response to Thurston County's Substantive Motion.

1 be GMA compliant in *1000 Friends v. Thurston County*, WWGMHB No. 05-2-0002, the
2 County's Motion should be granted.⁴ In contrast, Futurewise contends that to the extent
3 Thurston County was found out of compliance with the GMA in the April 22, 2009
4 Compliance Order for Case No. 05-2-0002, denial of the County's Motion is warranted.⁵
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6 On May 28, 2009, the Board issued an Order on Motion for Summary Judgment. The Board
7 held:

8 Futurewise states that *the remaining issue before the Board is whether the*
9 *County's removal of lands from consideration for designation as agricultural lands*
10 *of long term commercial significance based on the presence of 51% or more*
11 *wetlands on a parcel is compliant with the GMA.* This was a matter on which the
12 County has already been found to be out of compliance with the Growth
13 Management Act (GMA) in the No. 05-2-0002 case. Consequently, it cannot be
14 said that the County is entitled to judgment on this issue as a matter of law, and
15 summary judgment is not appropriate. Futurewise asserts that, based on the April
16 22, 2009 Compliance Order, it must prevail on this issue. But Futurewise did not
17 move for summary judgment. Therefore this issue remains before the Board.
[Emphasis added]

18 On June 5, 2009, the parties filed a Stipulation for Final Decision and Order.⁶ In this filing,
19 the parties stipulated as follows:

- 20 1. The sole remaining issue in this case is the same issue which this Board
21 found Thurston County out of compliance in Case No. 05-2-0002;
- 22 2. The issue described in the above-quoted excerpt from the Board's May 28,
23 2009 Order is the same issue for which the County was found out of
24 compliance by this Board in the April 22, 2009 Compliance Order for Case
25 No. 05-2-0002;
- 26 3. The record used and facts established in the April 22, 2009 Compliance
27 Order are to be deemed the record and facts established for all purposes in
28 this case;

30 ⁴ Futurewise Response, at 8-9.

31 ⁵ Futurewise Response, at 9.

32 ⁶ June 5, 2009 Stipulation for Final Decision and Order.

4. Futurewise has standing in this matter.

Based on this Stipulation, the parties request that the Board issue a Final Decision and Order in accordance with this stipulation. Because the parties have submitted this stipulation, the Board did not conduct a hearing on the merits.

II. BURDEN OF PROOF

For purposes of board review of the comprehensive plans and development regulations adopted by local government, the GMA establishes three major precepts: a presumption of validity; a “clearly erroneous” standard of review; and a requirement of deference to the decisions of local government.

Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and amendments to them are presumed valid upon adoption:

Except as provided in subsection (5) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

The GMA, as set forth in RCW 36.70A.320(3), further provides that the standard of review shall be whether the challenged enactments are clearly erroneous:

The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.

In sum, the burden is on the Petitioner to overcome the presumption of validity and demonstrate that any action taken by Thurston County is clearly erroneous in light of the goals and requirements of the Growth Management Act. RCW 36.70A.320(2). Where not clearly erroneous and thus within the framework of state goals and requirements, the planning choices of local government must be granted deference.

1 In this case, however, the parties have stipulated that the issue described in the above-
2 quoted excerpt from the Board's May 28, 2009 order is the same issue as previously ruled
3 on by this Board in the April 22, 2009 Compliance Order for Case No. 05-2-0002, for which
4 Thurston County was found out of compliance.
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6 **III. DISCUSSION**

7 The parties have stipulated that the remaining issue in this case is the same issue for which
8 this Board has previously found the County out of compliance in Case No. 05-2-0002.
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10 Therefore, it is not necessary for the Board to independently discuss the basis for finding
11 the County out of compliance with regard to its practice of excluding lands from
12 consideration for designation as agricultural lands of long term commercial significance
13 based on the presence of 51% or more wetlands on a parcel. The Board's analysis from
14 the April 22, 2009 Compliance Order in Case No. 05-2-0002 is incorporated into this Final
15 Decision and Order in its entirety, together with the following Findings of Fact and
16 Conclusions of Law.
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18 **IV. FINDINGS OF FACT⁷**

- 19 1. Thurston County is a county located west of the crest of the Cascade Mountains that
20 is required to plan pursuant to RCW 36.76A.040.
- 21 2. On December 29, 2008 the County adopted Resolution No. 14180 and Ordinance
22 14181.
- 23 3. On March 2, 2009 Petitioner filed a timely appeal.
- 24 4. The Compliance Report, filed for Case No. 05-2-0002, describes how the County
25 reclassified certain lands from various rural land use designations and zoning districts
26 to agricultural districts in response to the Board's October 22, 2008 Compliance
27 Order in that case.
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31 ⁷ The Findings of Fact in this case are based in part on the record created in case no. 05-2-0002, which the
32 parties stipulate is also the record and facts established in this case.

- 1 5. In making those classifications, the County decided, based on public and expert
2 testimony, that a parcel not currently in agriculture which is encumbered by more
3 than 51% of wetlands would be removed from consideration as agricultural land of
4 long term commercial significance.
- 5 6. The County Comprehensive Plan clearly sets forth nine criteria for designating
6 agricultural land of long-term commercial significance. None of these mention the
7 presence of wetlands. Although the ninth criterion for designation is "Environmental
8 Considerations," the County stated at the Compliance Hearing that this criterion does
9 not include consideration of the presence of wetlands but is limited to areas denoted
10 as "Natural Shoreline Environments" under the County's Shoreline Master Program.
11 Instead, the County chose to rely on the existence of its critical areas ordinance as a
12 basis for this exclusion.
- 13 7. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.

14 15 16 17 **V. CONCLUSIONS OF LAW**

- 18 A. The Board has jurisdiction over the parties to this action.
- 19 B. The Board has jurisdiction over the subject matter of this action.
- 20 C. Petitioner has standing to raise the issues in this case.
- 21 D. Removing lands from consideration for designation as agricultural lands of long-term
22 commercial significance, based on the presence of 51% or more wetlands on a
23 parcel, was clearly erroneous and in violation of RCW 36.70A.060 and
24 36.70A.170(1)(a) as such a consideration was not adopted by the County in its
25 Comprehensive Plan as one of its designation criteria.
- 26 E. Any Conclusion of Law later determined to be a Finding of Fact is adopted as such.

27 28 29 **VI. ORDER**

30 As this Board previously held in its April 22, 2009 Compliance Order in Case No. 05-2-0002:

1 [R]emoving lands from consideration for designation based on the presence of
2 51% or more wetlands on a parcel was clearly erroneous. Such a consideration
3 was not adopted by the County in its Comprehensive Plan as one of its
4 designation criteria. This matter is remanded to the County to determine if any of
5 the parcels removed from consideration as agricultural lands of long-term
6 commercial significance based upon the presence of 51% or more of wetlands
7 qualify for LTA designation under the County's nine adopted criteria.

8 The following compliance schedule, as set forth in the May 28 2009, Order on Motion for
9 Summary Judgment, shall apply:

10 July 21, 2009	Compliance Due
11 July 27, 2009	Compliance Report and Index to Record
12 August 4, 2009	Objections to Compliance Due and Deadline for 13 Petitioner's Prehearing Brief (with exhibits)
14 August 14, 2009	Deadline for Respondent's Prehearing Brief (with 15 exhibits)
16 August 21, 2009	Deadline for Petitioner's Reply Brief (optional)
17 August 26, 2009	Compliance Hearing 18 Telephonic hearing

19 DATED this 22nd day of June 2009.
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22 _____
23 James McNamara, Board Member

24 _____
25 William Roehl, Board Member

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27 Nina Carter, Board Member

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31 **Pursuant to RCW 36.70A.300 this is a final order of the Board.**

1 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
2 mailing of this Order to file a petition for reconsideration. Petitions for
3 reconsideration shall follow the format set out in WAC 242-02-832. The original and
4 three copies of the petition for reconsideration, together with any argument in
5 support thereof, should be filed by mailing, faxing or delivering the document directly
6 to the Board, with a copy to all other parties of record and their representatives.
7 Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),
8 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
filing a petition for judicial review.

9 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
10 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
11 judicial review may be instituted by filing a petition in superior court according to the
12 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
13 Enforcement. The petition for judicial review of this Order shall be filed with the
14 appropriate court and served on the Board, the Office of the Attorney General, and all
15 parties within thirty days after service of the final order, as provided in RCW
16 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
but service on the Board means actual receipt of the document at the Board office
within thirty days after service of the final order.

17 **Service.** This Order was served on you the day it was deposited in the United States
18 mail. RCW 34.05.010(19).
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